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G.W., Appellant)	
)	
and)	Docket No. 17-0020
)	Issued: June 23, 2017
DEPARTMENT OF THE ARMY, U.S. ARMY)	
GARRISON, Fort McPherson, GA, Employer)	
)	

Case Submitted on the Record

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

On October 6, 2016 appellant filed a timely appeal from a September 15, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated September 30, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On December 22, 2008 appellant, then a 59-year-old former utility systems repairer-operator, filed an occupational disease claim (Form CA-2) alleging that he developed cancer as a

¹ 5 U.S.C. § 8101 *et seq.*

result of prolonged exposure to toxic chemicals while in the performance of duty.² In October 2009, OWCP accepted his claim for other named lymphoma variants, lymph nodes head, face, and neck. It later expanded the claim to include lymphoma of the left upper eyelid, renal cell carcinoma of the right kidney with right nephrectomy, adverse effect of chemotherapy, and chemo-induced sensory motor neuropathy of the upper and lower limbs.

In an August 20, 2013 decision, OWCP granted appellant a schedule award for 100 percent loss of his right kidney. The award covered a period of 156 weeks from May 3, 2003 through April 28, 2006.

On February 2, 2015 OWCP received appellant's claim for an additional schedule award (Form CA-7). In a February 23, 2015 report, Dr. Samuel J. Olsen II, a Board-certified internist, found 50 percent permanent impairment of the left upper extremity and 40 percent permanent impairment of the right upper extremity. He also found 40 percent permanent impairment of the left lower extremity and 30 percent permanent impairment of the right lower extremity. However, Dr. Olsen indicated that his impairment rating was not based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*).

Based on the March 9, 2015 advice of its district medical adviser, OWCP referred appellant for a second opinion evaluation to determine the existence and extent of any permanent impairment to the bilateral upper and lower extremities. Dr. Bruce R. Leforce, a Board-certified neurologist, examined appellant on July 23, 2015 and provided a July 28, 2015 impairment rating. He found that appellant had reached maximum medical improvement and opined that he had three percent permanent impairment of both the left and right lower extremities due to mild sensory changes in the distal lower extremities.

In an August 27, 2015 report, the district medical adviser, Dr. James W. Dyer, a Board-certified orthopedic surgeon, reviewed the relevant medical evidence and concurred with Dr. Leforce's three percent bilateral lower extremity impairment under Table 16-12, Peripheral Nerve Impairment, A.M.A., *Guides* 534 (6th ed. 2009). He also found no permanent impairment with respect to appellant's upper extremities.

By decision dated September 30, 2015, OWCP granted appellant a schedule award for three percent permanent impairment of both the left and right lower extremities. The award covered a period of 17.28 weeks from July 23 through November 20, 2015.

On September 6, 2016 OWCP received appellant's September 1, 2016 correspondence requesting reconsideration of his "visit to Dr. Le Force." Appellant took issue with OWCP's reliance on Dr. Leforce's evaluation. He noted that the visit and brief history lasted only 15 minutes and that Dr. Leforce did not review his record. Appellant also indicated that Dr. Leforce only asked him a few questions concerning his medical conditions. Additionally, Dr. Leforce reportedly spoke to appellant in a condescending manner and repeatedly asserted that appellant "only wanted something from the Government (money)."

² At the time he filed his claim, appellant was no longer employed by the Department of the Army. On the Form CA-2, his former employing establishment noted that he currently worked as a project engineer with the General Services Administration (GSA). Appellant voluntarily retired from GSA effective July 3, 2009.

In a September 15, 2016 decision, OWCP denied appellant's request for reconsideration without a review of the merits of the claim. It noted that he had not submitted any medical evidence indicating that Dr. Leforce's impairment rating was incorrect.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁵ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment at a later date causally related to the employment injury.⁸ OWCP procedures provide that a claim for an increased schedule award may be based on an incorrect calculation of the original award or an increased impairment at a later date which is due to work-related factors. In such a situation, an increased schedule award may be payable if supported by the medical evidence.⁹

³ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System. *Id.* at Chapter 2.1602.4b.

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608(a), (b).

⁸ *See K.J.*, Docket No. 06-1192 (issued November 17, 2006).

⁹ *Supra* note 5 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9 (February 2013). In addition, OWCP procedures provide that a request for reconsideration of a schedule award based on a disagreement with the percentage awarded must be distinguished from a situation where a claimant who previously received an award is filing for an increased impairment due to a worsening of the claimant's medical condition due to deterioration of his or her condition or increased exposure. Such a request for increased impairment is not subject to the one-year time limitation for reconsideration. *Supra* note 5 at Chapter 2.1602.5.a (February 2016).

ANALYSIS

In a September 15, 2016 decision, OWCP denied appellant's request for reconsideration and did not review the merits of the claim, noting that he had not submitted any medical evidence indicating that Dr. Leforce's impairment rating was incorrect. The Board finds that this was proper because appellant did not claim an incorrect calculation of the original award. As appellant has not made a claim for an increased schedule award for his lower extremities, he is not entitled to a merit decision on the medical evidence.¹⁰

In his September 6, 2016 request for reconsideration, appellant took issue with Dr. Leforce's July 23, 2015 second opinion evaluation, noting that the physician was condescending and had not conducted a thorough evaluation. However, he neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance any relevant legal arguments not previously considered by OWCP. The Board finds that he is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).¹¹

Appellant also failed to submit any relevant and pertinent new evidence with his September 6, 2016 request for reconsideration. The issue on reconsideration was whether he had greater than three percent permanent impairment of the left and right lower extremities. This was a medical issue, and notwithstanding appellant's criticism of Dr. Leforce's second opinion evaluation, he did not submit any medical evidence demonstrating a greater impairment than previously awarded. Because appellant did not provide any relevant and pertinent new evidence, he is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹² Accordingly, OWCP properly declined to reopen his case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁰ *Cf.*, *supra* note 8 (where the claimant used the term reconsideration in his May 19, 2005 letter, but clearly expressed a request for an increased schedule award, indicating that his condition had worsened and referred to a magnetic resonance imaging scan as support for an additional schedule award, the Board found that he had made a claim for an increased schedule award for his lower extremities and was entitled to a merit decision on the medical evidence).

¹¹ *Id.* at § 10.606(b)(3)(i) and (ii).

¹² *Id.* at § 10.606(b)(3)(iii).

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board